No. 01-332

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In The

Supreme Court of the United States

BOARD OF EDUCATION OF IND. SCHOOL DIST. NO. 92 OF POTTAWATOMIE COUNTY, et al.,

Petitioners,

v.

LINDSAY EARLS, et al., etc.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, THE CATO INSTITUTE, AND COMMON SENSE FOR DRUG POLICY IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

All four of the *amici curiae* are nonpartisan organizations that oppose and have taken public stands against suspicionless drug testing. Their members are deeply concerned that the "war on drugs" has become a war on personal privacy and the Fourth Amendment. These groups have diverse backgrounds and constituencies which are allied in this common cause:

The National Association of Criminal Defense Lawyers (NACDL; www.nacdl.org) is the preeminent bar organization advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. Founded in 1958, NACDL has more than 10,000 lawyer members and 80 state and local affiliate organizations with 28,000 lawyer members committed to preserving the Bill of Rights. The American Bar Association recognizes NACDL as an affiliate organization on its House of Delegates. NACDL promotes study and research in the field of criminal law. In furtherance of its objectives over the past decade, NACDL annually files approximately ten *amicus* briefs with this Court on criminal justice and personal privacy issues.

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[1] Pursuant to S.Ct. Rule 37.6, counsel certifies that no counsel for a party authored any part of this brief. No person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

Pursuant to S.Ct. Rule 29.6, all four *amici* are nonprofit corporations. None has a parent corporation, and none is a publicly held corporation, nor does a publicly held company own 10% or more of their stock.

The National Organization for the Reform of Marijuana Laws (NORML; www.norml.org) was organized in 1970, and participates in the public policy debate over marijuana policy for the tens of millions of adult Americas who use marijuana responsibly. NORML lobbies for the rights of marijuana users and other taxpayers and voters who oppose current prohibition policies. NORML has thousands of financial supporters from every state. It also has a grassroots political network of more than 18,000 volunteer activists, including 60 state and local affiliated organizations, who oppose the criminal prohibition of marijuana. Accordingly, they also oppose indiscriminate testing of individuals for drugs by the government. NORML has filed *amicus* briefs in this Court on personal privacy issues in drug cases.

The Cato Institute (www.cato.org) is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited constitutional government. To further those ends, Cato Institute scholars have published a number of works discussing the importance of the Bill of Rights, including the constitutional protections against warrantless and unreasonable searches. The instant case raises important questions concerning the power to conduct warrantless and coercive drug tests and is thus of substantial interest to the Cato Institute.

Common Sense for Drug Policy (www.csdp.org) is an educational organization that focuses on providing the public and policy makers with accurate information in an effort to develop more effective drug policies. Common Sense believes that drug abuse should be primarily treated as a public health issue rather than a law enforcement issue.

The parties have consented to the filing of this *amici* brief on behalf of the respondents, and the letter of consent is already filed with the Clerk.

SUMMARY OF THE ARGUMENT

Suspicionless urine testing of non-athlete students "does not fit without the closely guarded category of constitutionally permissible suspicionless searches." *Chandler v. Miller*, 520 U.S. 304, 309 (1997). While *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), permits drug testing of student athletes, it cannot be read to permit drug testing of all students involved in extracurricular activities because the justifications recognized by this Court in *Vernonia* have no application to these other students.

Individualized suspicion of wrongdoing is normally required before a search may be conducted. "Special needs" may justify dispensing with individualized suspicion in narrowly drawn situations, if the privacy interest is minimal and the means of achieving it serves those ends.

The privacy interest in one's urine is significant. The students here are required to urinate into a cup while a teacher listens outside the stall (girls) or behind them (boys) for sounds of tampering. When it is produced, the teacher feels the cup for temperature of the urine and holds it up to the light to examine it. The student has to produce a list of prescription medications for the testing company to check for false positives. This is all still a significant intrusion.

Students in these extracurricular activities cannot be compared to the student athletes in *Vernonia* to determine whether they have a lesser expectation of privacy. Athletes use communal locker rooms and showers, but the Athletic Team, Band, and Choir do not. Simply by participating in after-school activities, these students cannot be said to have sacrificed their expectation of privacy that society expects and requires and then become subject to random drug testing.

The selection of all students in any extracurricular activity has the vice of being both over- and under-inclusive. The Academic Team is hardly a likely source of students who will be drug abusers. If they were drug abusers, they would not perform well enough to be on the Academic Team in the first place. Because they are not involved in extracurricular activities, the policy exempts students involved in all the science laboratories and any shop activities. A student mixing potentially toxic chemicals, putting an engine in a car, or handling sharp metal or an acetylene torch is more of a threat to him or herself or others if under the influence than someone on the Academic Team.

Reasonableness is the ultimate question in any warrantless search. This testing program is unreasonable because it singles out students for testing who are more likely not to be a threat of being drug abusers and leaves untested those who more logically should be tested. Therefore, this test is not narrowly drawn to satisfy any governmental interest, so it fails under *Vernonia*.

ARGUMENT

SUSPICIONLESS URINE TESTING OF NON-ATHLETE STUDENTS "DOES NOT FIT WITHIN THE CLOSELY GUARDED CATEGORY OF CONSTITUTIONALLY PERMISSIBLE SUSPICIONLESS SEARCHES" AND THUS VIOLATES THE FOURTH AMENDMENT.

This case involves the tension between the liberty of the individual to be free from a suspicionless drug testing search and the petitioner school district's asserted justification of protection of our children from drugs under the "special needs" exception. Both interests are weighty in their own right, but, in the end, after conducting a "context specific" inquiry, the need to protect all school children from drugs cannot overcome the constitutional need for individualized suspicion for a drug test.

The justification for testing of student athletes has no application to testing students in any extracurricular activity the school chooses. Without individualized suspicion, all public school students could ultimately be subjected to drug searches to test their urine, and that is not faithful to our societal understandings of what we expect from our government and the history of the Fourth Amendment.

A. Our historical constitutional heritage is based on and incorporates a right of privacy – "the right to be let alone"

The desire to be free from arbitrary governmental interference into our personal property and our personal

doings was one of the main reasons, as an English Colony, we declared our independence and fought the American Revolution. The full history of the struggle against government-issued writs of assistance to search for smuggled goods or controversial writings has been recounted elsewhere, and it will not be repeated here.[2] Suffice it to say that, by 1765, writs of assistance and general warrants both in England and here created great resentment among the colonists and English subjects. First in *Wilkes v. Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763), and shortly thereafter in *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765), English government officers executing general warrants for unnamed persons and papers were held liable in trespass, and the judgments in those cases were widely circulated and applauded, both there and here for their expressions of limits on the unrestrained powers of government over individual privacy. *See Boyd v. United States*, 116 U.S. 616, 627-28 (1886); *Marcus v. Search Warrant of Property*, 367 U.S. 717, 724-29 (1961).

The abuses of government in the two decades prior to the Declaration of Independence and the American Revolution were obviously still fresh on the drafters' minds when the Constitutional Convention met. When the Constitution was sent to the states and adopted in

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[2] Unrestrained search and seizure was one of the causes of the American Revolution. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES ch. 1-3 (1937), and LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT ch. 1 (1966). The colonial experience with the law of search and seizure is also recounted in 2 LEGAL PAPERS OF JOHN ADAMS 106-47 (1965).

1789, it was only with the understanding that a Bill of Rights would shortly follow. The whole point of the adoption of the Fourth Amendment was to free Americans from a history of seriously ingrained distrust of government officials conducting warrantless and "unreasonable searches." 3 WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791 at 1402-03 (1990).

> This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument of stifling liberty of expression.

Marcus, 367 U.S. at 729.

There is a basic right to privacy in this nation, "the right to be let alone," and it runs throughout our law of individual liberty. Whatever its original, pre-Constitutional source, be it in the common law[3] or the law of torts,[4] government must recognize that certain privacy rights are beyond its reach.

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[3] *See Union Pac. Ry. Co. v. Botsford, infra; Poe v. Ullman*, 367 U.S. 497, 521 & n.12 (1961) (DOUGLAS, J., dissenting) ("The notion of privacy is not drawn from the blue. [n.12: The right 'to be let alone' had many common-law overtones.] It emanates from the totality of the constitutional scheme under which we live.") & 543 (HARLAN, J., dissenting) (in addition, it protects against "arbitrary impositions and purposeless restraints" by government (quoting *Hurtado v. California*, 110 U.S. 516, 632 (1884)).)

[4] *See generally* Warren & Brandeis, *The Right to Privacy*, 4 HARV.L.REV. 193 (1890); Prosser, *Privacy*, 48 CALIF.L.REV. 391

The phrase "the right to be let alone" was first used in a tort case, quoting Judge Cooley's[5] torts treatise, *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 251 (1891), where the railroad sought a physical examination of an injured passenger. This Court affirmed the lower court's refusal to permit the examination of her body so the railroad could separately evaluate the seriousness of her injury:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: "The right to one's person may be said to be a right of complete immunity; to be let alone." Cooley, Torts, 29.

Union Pac. Ry., 141 U.S. at 251.

The phrase "the right to be let alone" was truly memorialized in Justice BRANDEIS's famous dissent 74 years ago in *Olmstead v. United States*, 277 U.S. 438, 478 (1928):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found

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(1960); Griswold, *The Right to Be Let Alone*, 55 NW.U.L.REV. 216 (1960).

[5] Cooley was also the author of THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS which was first published in 1868 and went through at least six editions.

> in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the *most comprehensive of rights and the right most valued by civilized men*. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

(emphasis added)

While the "right to be let alone" originally emerged in this Court's cases in a dissent, the existence of a constitutional right "to be let alone" is now well accepted. The Court has repeatedly cited *Olmstead* and considered "the right to be let alone" as a part, not only of the Fourth Amendment,[6] but also the First,[7] Fifth,[8] and Fourteenth[9] Amendments and a general right of privacy.[10]

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[6] *California Bankers Assn. v. Shultz*, 416 U.S. 21, 65 (1974); *Winston v. Lee*, 470 U.S. 753, 758-59 (1985). *See Katz v. United States*, 389 U.S. 347, 350-51 & n.6 (1967).

[7] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 736 (1970). *See also* note 10, *infra*.

[8] *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966). *See United States v. Morton Salt Co.*, 338 U.S. 632, 651-52 (1950).

[9] *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 n.10 (1972).

[10] *Bartnick v. Vopper*, 121 S.Ct. 1753, 1766 (2001) (BREYER with O'CONNOR, JJ., concurring); *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000) (unwilling listener has a right to avoid "unwanted communication" or "unwelcome speech"; includes right of free passage into an abortion clinic).

Many state and federal courts have used the phrase as well.[11]

The "right to be let alone" is now so substantial and ingrained into the Fourth Amendment that it has been found to outweigh even the weightiest of governmental interests: The interest in procuring evidence to prosecute a violent crime. In *Winston v. Lee*, 470 U.S. 753, 765-66 (1985), the Court denied the government the ability to obtain evidence by forced major surgery on the body of the accused to remove a bullet, even where the search would certainly produce evidence of a violent crime:

> The Fourth Amendment protects "expectations of privacy," see *Katz v. United States*, 389 U.S. 347 (1967) – the individual's legitimate expectations that in certain places and at certain times he has "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (BRANDEIS, J., dissenting). Putting to one side the procedural protections of the warrant requirement, the Fourth Amendment generally protects the "security" of "persons, houses, papers, and effects" against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily "probable cause." Beyond this point, it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community's vital interests in law enforcement; such a search is generally "reasonable" in the Amendment's terms.

[11] A Westlaw® search reveals 1,031 cases using the phrase.

But, the Court held that this compelled surgical intrusion for evidence implicated expectations of privacy and personal security to such a degree that the intrusion was constitutionally unreasonable under the Fourth Amendment even though it certainly would produce evidence of a violent crime. *Id.* at 758-59. The government's almost always compelling need to obtain vital evidence to enforce the criminal law and prosecute a violent criminal constitutionally had to give way to the personal dignity of the individual because the magnitude of the search made it "unreasonable" under the Fourth Amendment.

The "right to be let alone," this "most comprehensive of rights and the right most valued by civilized men," is incorporated into our Fourth Amendment jurisprudence, and it prohibits this virtually indiscriminate urine testing program that the petitioners have implemented. Thus, we turn to the Fourth Amendment analysis.

B. The requirement of individualized suspicion vs. special needs in urine testing

> To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. See *Vernonia*, 515 U.S., at 652-653. But particularized exceptions to the main rule are sometimes based on "special needs, beyond the normal need for law enforcement." *Skinner*, 489 U.S., at 691 (internal quotation marks omitted). When such "special needs" – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context specific inquiry, examining

> closely the competing private and public interests advanced by the parties. See *Von Raab*, 489 U.S., at 665-666; see also *id.*, at 668. As *Skinner* stated, "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." 489 U.S., at 624.

Chandler v. Miller, 520 U.S. 304, 313-14 (1997).

This Court has sustained compulsory urine testing under the special needs exception in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (testing of those involved in accidents or who violate certain rules), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (testing permitted of Customs officers who carried firearms was reasonable; tests of others not reasonable because of no government interest), and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (testing permitted of student athletes). It struck down compulsory urine testing in *Chandler* (testing of certain candidates for office unreasonable) and *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001) (neonatal urine testing unreasonable where results were shared with law enforcement).

This case involves Tecumseh School's effort to test persons involved in extracurricular activities by extending *Vernonia* beyond its reach. In this "context specific inquiry," *amici* submit that petitioners present no "special needs" for their program. The requirements of *Vernonia*

that permitted suspicionless urine testing of student athletes on a true showing of need are simply nonexistent in this case.

C. *Vernonia* applied

Vernonia gives three factors to test the constitutionality of a drug testing policy: (1) the "nature of the privacy interest upon which the search here at issue intrudes," 515 U.S. at 654; (2) "the character of the intrusion that is complained of," *id.* at 658; and (3) the "nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it," *id.* at 660. Petitioners' argument must fail if it cannot satisfy any one of the three *Vernonia* factors. While the Tenth Circuit found only the third factor weighed heavily in favor of the school children, *amici* submit that the other two factors also weigh in their favor, and this Court should affirm.

1. The "nature of the privacy interest"

The Court of Appeals found that students applying to extracurricular activities had "a somewhat lesser privacy expectation" than other students. *Earls v. Bd. of Education of Tecumseh Public School Dist.*, 242 F.3d 1264, 1276 (10th Cir. 2001). *Amici* disagree with this conclusion because there is indeed a significant privacy interest involved in the act of urination of non-student athletes, notwithstanding the Tenth Circuit's application of *Vernonia*.

There can be no doubt that we all have a reasonable expectation of privacy in our urine, particularly when it is taken from us on demand by government. *Ferguson v. City of Charleston,* 121 S.Ct. at 1287; *Vernonia,* 515 U.S. at 652; *Skinner,* 489 U.S. at 617. In *Von Raab,* 489 U.S. at 617, this Court said:

> Unlike the blood-testing procedure at issue in *Schmerber,* the procedures prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion into the body. It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:
>
> > "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom."
>
> *National Treasury Employees Union v. Von Raab,* 816 F. 2d 170, 175 (CA5 1987). Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously,

> and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

It is also a "seizure." *Id.* at 617 & n.4, citing *United States v. Jacobsen,* 466 U.S. 109, 113 (1984).

The passing of urine into a cup and then handing it over to a school official may be not much more of an invasion of privacy than what a student athlete endures part and parcel of "going out for the team," including "communal undress" and having a preseason physical which includes a urine test. *Vernonia,* 515 U.S. at 657. It is, however, a far greater invasion of privacy to one who does not willingly subject him or herself to such communal activities. How does it remotely follow that one who joins the Academic Team, Band, Choir, or FHA at Tecumseh has voluntarily engaged in a communal activity that lessens his or her expectation of privacy? It does not. It is completely illogical. Petitioners bear the burden of showing a justification, and, to satisfy Fourth Amendment reasonableness, it must be logical and not the strained and tenuous justification they proffer.

Our use of public bathrooms does not lessen our expectation of privacy at all. Unless one is homebound, he or she will have to use bathrooms larger than their bathroom at home when away from home, and other people may be in there, too. While it is true that others in a public bathroom can hear us urinate, they are certainly not listening to make sure we are not seeking to deposit bogus urine in a urinal or toilet. Moreover, they are not trying to force us to urinate on cue into a cup while listening for tampering and then take that urine from us to feel its temperature through the side of the cup then

hold it up to the light to examine its color and converse or make light of it in the process, as happened here.

Even though we do not commonly experience government looking and listening to discern the temperature, quality, and quantity of our excretion, our expectation of privacy in the act of excretion is an "expectation . . . that society is prepared to recognize as 'reasonable.' " *Katz v. United States*, 389 U.S. 347, 361 (1967) (HARLAN, J., concurring). Our "understandings that are recognized and permitted by society"; *Minnesota v. Olson*, 485 U.S. 91, 99-100 (1990), quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978); dictate that the act of urination be and remain private unless there is a compelling governmental need to overcome that privacy.

We may expect our luggage on a bus or airplane will be handled by others who might push it aside or move it, but our societal expectation is that we do not expect it to be handled by a government agent seeking to "search" it by feeling it to discover the contents. *Bond v. United States*, 529 U.S. 334, 338-39 (2000). Similarly, while heat escapes from our home, societal expectations protect us from the police using a thermal imager without a warrant to discover what we are doing inside our own homes. *Kyllo v. United States*, 121 S.Ct. 2038, 2043 (2001).

If our luggage on public transportation is protected, *a fortiori*, why is not the private act of excretion in a public bathroom? *Amici* submit that *Bond* requires that petitioners' position be rejected under the first *Vernonia* factor. To state, without reasoned analysis, that non-athletes have no reasonable expectation of privacy in their act of urination because of their participation in group activities

distorts both reality and the basis of *Vernonia* beyond all its limits. How is it that any group activity of the Academic Team, Band, Choir, and FHA somehow makes the act of urination no longer private? On a road trip they still use the bathroom alone, unlike the athletes with their communal locker rooms and showers.

Students cannot have reasonably been said to have sacrificed their privacy to that degree by attending public school. The nature of petitioners' argument is that if the Court approves Tecumseh's urine testing program, it will be expanded to all students in any extracurricular activity, just as some commentators have sought,[12] and then to all students, as others have sought.[13] Such end results are neither acceptable nor reasonable under Fourth Amendment reasonableness and *Vernonia*.

School children are required by the law in every state to attend school through a certain minimum age. Higher education is, however, a privilege, and entry into one's school of choice is often highly-competitive, requiring more than just good grades. Accordingly, many students must engage in extracurricular activities to get into the

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[12] James M. McCray, *Urine Trouble! Extending Constitutionality to Mandatory Suspicionless Drug Testing of Students in Extracurricular Activities*, 53 VAND. L. REV. 387, 426 (2000); Ralph D. Mawdsley & Charles J. Russo, *Random Drug Testing and Extracurricular Activities*, 159 EDUC. L. REP. 1, 15 (2002).

[13] *See* Joanna Raby, *Reclaiming Our Public Schools: A Proposal for School-Wide Testing*, 21 CARDOZO L. REV. 999, 1024-28 (1999) (*Vernonia* supports school-wide urine testing).

college they want,[14] as did Miss Earls getting into Dartmouth. If students in virtually any extracurricular activity may be drug tested, the school effectively only drug tests the college-bound; *i.e.*, the mediocre and unambitious students, the slackers (those supposedly most at risk to use drugs), would be the only ones exempt from such a search. That is a curious result: Tecumseh penalizes excellence by drug testing those who desire to better themselves and immunizes those students who have no ambition and no desire to go to a non-state supported college. Students need only avoid extracurricular activities to avoid detection as a drug user, and they would get neither drug education nor treatment. Thus, it is reasonableness turned inside out and stood on its head. What is worse, it explains itself as bad policy.

2. "Character of the intrusion" is significant

The Court of Appeals found the character of the intrusion is no different here than in *Vernonia*, 515 U.S. at 660: "the invasion of privacy is not significant." 242 F.3d at 1276.

Amici submit that this, too, is incorrect. As stated above, the invasion of privacy contemplated here is more significant and embarrassing than the student athletes in *Vernonia*. Add to it the fact that students are summoned from class for testing rather than tested during their

[14] *Trinidad School Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109 (Colo.1998), quoted by the Court of Appeals below, 242 F.2d at 1276.

normal athletic training amongst each other, and attention is called to the fact they are being tested. They are stigmatized by being called out because being singled out by the school is an anathema to many teenagers. This is no small matter; they have "a right to be let alone" unless the government can show a weighty justification.

3. "Nature and immediacy of the governmental concern . . . and the efficacy of this means for meeting it"

The Court of Appeals found on this factor that the Tecumseh drug testing policy failed to satisfy *Vernonia*, and it held the Tecumseh policy failed. 242 F.3d at 1276-79. This is correct for multiple reasons beyond what respondents will argue:

a. The "drug problem" at Tecumseh is virtually non-existent

One critical basis for the holding in *Vernonia* was the trial court's finding that an "epidemic" of drug abuse existed there and there was "rebellion" "particularly [of] those involved in interscholastic athletics." *Id.* at 662-63. This case, however, involves a school district with virtually no drug problem before the testing program was adopted. To the date of the summary judgment, only 3 students of 500 over the testing years (nearly 800 students in school every year) had tested positive: 0.6% of those tested. That is hardly the "epidemic" found in *Vernonia*. Rather, this situation is more like the "lack of a concrete danger" found in *Chandler v. Miller*, 520 U.S. at 319.

Real numbers would "shore up an assertion of special need for a suspicionless search program." *Id.* Here, there are no real numbers. Tecumseh has the good fortune to have virtually no drug problem, but they want to create one to justify their drug testing program and as a mere symbol to the school district's commitment to drug-free after school activities. That alone should make it constitutionally suspect under *Chandler*.

b. The testing program here is both over- and under-inclusive

At what point is there a "drug problem" under *Vernonia*? What percentage of those who have *ever* used drugs versus those who are currently using drugs is relevant? And what percentage is permissible and over what span of years? 5%? 1%? 0.6%? 0.01%? At what point do the indiscretions of few, a number so small that can be counted on one hand out of the nearly 1500 students[15] that must have passed through Tecumseh during this program, justify government's ability to drug test practically everybody? *Id.* Because a small number of the general population commit crime, government has no power to treat all of us as criminals and search us for crime prevention; *see City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (general roadblocks unconstitutional); or to seek to prove us guilty by fingerprinting without individualized suspicion. *Davis v. Mississippi*, 394 U.S. 721

[15] And, if that many students passed through, three positive tests is 0.2% of the whole number.

(1969) (dragnet for fingerprints unconstitutional). But, that is what this drug testing program really is.

The selection of students to be drug tested is both over- and under-inclusive and deprives the testing program of any opportunity to truly serve the school district's true interests in combating (future) drug abuse in students. Accordingly, it fails to satisfy Fourth Amendment reasonableness.

Tecumseh requires non-athletes involved in the Academic Team, Band, Choir, Show Choir, Color Guard, Future Farmers of America (FFA), and Future Homemakers of America (FHA) to submit to drug testing as a condition of participation for safety reasons.[16] It does not, however, require students involved in laboratory classes in chemistry, biology, or physics be tested, nor does it require testing of students in shop classes or driver education. The school board was concerned about the dangers to students having to handle and wrestle large animals while under the influence, but it expresses no concern with students having to handle and wrestle with, for example, saws and drills, an acetylene torch to weld or cut metal, red hot or sharp metals, an automobile engine being installed in a car or a car being placed on jacks for repair, wielding a scalpel in biology or handling acid in chemistry, or learning to drive a car with no experience. We must conclude that because Tecumseh decided to test students in extracurricular activities, the school board felt that testing those in extracurricular

[16] How the Academic Team, Choir, or FHA are at risk of injury will never be explained.

activities would be approved by the courts after *Vernonia*.[17]

Amici submit that drug testing the Academic Team is counterintuitive. If student drug usage is so insidious and destructive that it causes students to have lower grades and poor performance, then drug usage by members of the Academic Team would readily show up in their performance and they would be dropped from the team. Every reason petitioners cite concerning deficient academic performance by drug users excludes the Academic Team *by definition* from any need to be drug tested. Thus, the Academic Team is tested, but apparently only for Vernonian cover because application to *any* extracurricular activity triggers drug testing under this policy.

Just because some people drive drunk, government does not have the power to stop every car to look for drunk drivers. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 454 (1990), quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (traffic stop to look at driver's license was unconstitutional; " 'standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.' "). A drunk driver on the streets, however, is a far greater threat to others than a student who might have done drugs at some undefined time in the past who tests positive but is not under the influence. One can see a drunk driver by the way he drives, and that gives officers

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[17] *See* McCray, note 12, *supra* (*Vernonia* permits drug testing of anyone involved in any extracurricular activities).

individualized suspicion to stop the vehicle for further investigation. That is individualized suspicion by definition. Tecumseh tests a large group of students with no suspicion or legal justification whatsoever.

Under *Chandler*'s "context specific inquiry," the policy here fails to include others who are more of a risk to themselves or others if under the influence of mind-altering substances at school. And, at the same time, the policy includes those who could not be under the influence or they would not possibly be in the covered group (*e.g.*, the Academic Team). The third factor of *Vernonia*, 515 U.S. at 606, the "nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it," must consider the overbreadth of this program. Therefore, the program is constitutionally unreasonable because of its sweep alone.

c. This testing program is not swift enough to justify dispensing with individualized suspicion under *T.L.O.*

One premise of applying the "special needs" exception to students in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), is that a warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.*, 469 U.S. at 340. This urine testing program is not swift – the urine sample is sent to a drug laboratory in Tulsa for testing, and it is tested differently a second time if it tests positive. J.A.70. An officer may require an hour or two to get a warrant, but it presumably takes one business day for the mail to go between Tecumseh and Tulsa, a little

over 100 miles. Therefore, if the test is performed upon the sample immediately upon receipt and the results are mailed back from the lab, the results would not be revealed for a minimum of two days – hardly the kind of swift response contemplated by *T.L.O. See Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987).

d. This drug testing program sets a poor example for the students

The Tecumseh testing program creates a poor example for the students. When a testing program is enforced against so many people without individualized suspicion, they learn that individual liberty is meaningless. Students also see this testing program as largely symbolic, and the school district loses credibility. "For good or for ill, [our Government] teaches the whole people by its example." *Olmstead*, 277 U.S. at 485.

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Id. at 479, quoted in *Von Raab*, 489 U.S. at 687 (SCALIA, J., dissenting).

> Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us – who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

Von Raab, 489 U.S. at 698 (SCALIA, J., dissenting).

D. Reasonableness – the ultimate question in any warrantless search

The ultimate Fourth Amendment question, as always, is "reasonableness."

> [T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. . . . What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." . . . Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Skinner, 489 U.S. at 618, quoting *Prouse*, 440 U.S. at 654, quoted in *Vernonia*, 515 U.S. at 652. This Court has long held that the "fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances." *United States v. Chadwick*, 433 U.S. 1, 9 (1977).[18]

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[18] *Accord: Griffin v. Wisconsin*, 483 U.S. at 873; *O'Connor v. Ortega*, 480 U.S. 709, 719 (1987); *Donovan v. Dewey*, 452 U.S. 594, 602 (1981); *Delaware v. Prouse*, 440 U.S. at 653-54.

Amici submit that the testing program employed by Tecumseh does not "fit within the closely guarded category of constitutionally permissible suspicionless searches" (*Chandler*, 520 U.S. at 309) because the testing program is both over- and under-inclusive. It is not narrowly drawn with a view toward limiting the number of students subject to testing to those who truly require it.[19] As the Court of Appeals pointed out, if it permitted this drug test, "schools could test all of their students simply as a condition of attending school." 242 F.3d at 1278.

That is what school districts want, but this form of suspicionless and standardless testing does not satisfy the "special needs" exception for warrantless searches of the person. Therefore, it is unreasonable under the Fourth Amendment.

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[19] *Amici* do not agree that suspicionless urine testing of high school students is constitutional. Nevertheless, we are governed by *Vernonia*, so we operate within its holding.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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